

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Willis Todd CAREY Z-562-32-2226

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2265

Willis Todd CAREY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and 46 Code of Federal Regulations 5.30-1.

By order dated 30 April 1980, and Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's merchant mariner's document and all other valid Coast Guard documents for three (3) months on six (6) months' probation, upon finding him guilty of wrongful failure to join his vessel. The specification found proved alleges that while serving as able bodied seaman aboard SS BEAVER STATE under authority of the document above captioned, on 24 November 1978, Appellant wrongfully failed to join his vessel off Labuan, Malaysia.

The hearings were held at Long Beach, California, on 11 December 1979, and 8 January, 20 March and 11 April 1980.

At the hearings on 11 December 1979 and 11 April 1980, Appellant appeared pro se, having been advised of his right to be represented by counsel of his choice and having waived this right at the hearing on 11 December 1979. At the hearing on 8 January 1980, the disposition of John Manning was taken on behalf of Appellant without Appellant or counsel present. At the brief hearing on 20 March 1980, the proceedings were continued, at Appellant's prior request, to 11 April 1980. At the hearing on 11 December 1979, Appellant had entered a plea of not guilty to the charge and both specifications.

The Investigating Officer introduced in evidence a Certification of Shipping Articles, official log entries for 22 and 24 November 1978, and two medical log entries for the period 1-25 November 1978. Appellant offered in evidence his own testimony and the depositions of John P. Manning, Jeffrey P. Wills, Robert D. Gehring, and Peter A. Lavelle.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and second specification alleging failure to join the vessel had been proved, but that the first specification alleging absence without leave two

days earlier had not been proved, and dismissed the first specification.

The entire decision was served on 5 May 1980. Appeal was timely filed. By his notice of appeal dated 13 April 1980, Appellant requested a different Administrative Law Judge and requested a rehearing. The Administrative Law Judge by letter of 30 April 1980 transmitted his written decision and order to Appellant and denied the petition to reopen the hearing because no newly discovered evidence had been presented as required by 46 CFR 5.25-1.

FINDING OF FACT

From 31 October 1978 until 24 November 1978, Appellant was serving as an able seaman on board SS BEAVER STATE, a merchant vessel of the United States, under the authority of his duly issued merchant mariner's document.

On 17 November 1978, Appellant was given proper medical treatment for scabies, a bottle of "kwel" lotion.

There was no shortage of medication for scabies on board BEAVER STATE during the period 31 October 1978 to 24 November 1978.

The Third Mate was giving the recommended medication for scabies treatment to Appellant, John Manning, Peter Lavelle, and T. Burke.

At approximately 1000 on 22 November 1978, BEAVER STATE was anchored off Labuan, Malaysia, awaiting orders. The vessel's agent was aboard to clear the vessel when the Master noted Appellant, dressed in his shore-going clothes and with his bags, accompanying the agent and the agency doctor.

The master asked Appellant at the pilot hoist what he was up to, and Appellant replied, "Captain, I have to get off this ship." The Master told Appellant that he could not get off since he was on foreign articles and the vessel was in a foreign port. Appellant replied that he had to get off due to an infectious disease. The Master knew at this time that Appellant's condition had been diagnosed as scabies and treated by the vessel's medical officer. The Master checked with the medical officer on the necessity for Appellant to leave the vessel for further treatment of scabies and was advised that there was no such necessity. The Master advised Appellant that if he left the vessel he could be found guilty of desertion and lose his papers. In response, the Appellant states "That is something I will have to live with."

Appellant climbed onto pilot air hoist and held onto the side of the vessel. Only to avoid harm to Appellant, the Master ordered him to be lowered into the agent's launch, in which Appellant left BEAVER STATE with all his gear.

The next day, 23 November 1978, Appellant called the vessel via VHF radio-telephone and spoke to the Second Mate. Appellant asked him to advise the Master that he (Appellant) was sorry about what had happened. The Second Mate did not interpret the call as a request to speak to the Master and did not advise Appellant that he could not return to the vessel.

On 24 November 1978 the vessel made its regularly scheduled sailing from Labuan, Malaysia, and Appellant was not aboard. Appellant had left Labuan and gone to Singapore on 23 November 1978, where he later obtained medical treatment and employment on another vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

(1) the scabies condition justified Appellant's departure from the vessel to obtain better medical treatment;

(2) Appellant's petition to reopen his hearing due to his assertions that the Second and Third Mates lied under oath was improperly denied;

(3) Coast Guard delay hindered his case due to memory loss by some of Appellant's witnesses;

(4) Appellant cannot be found guilty of desertion when he was found not guilty of desertion on one specification; and

(5) his failure to join was justified because he was rebuffed in his alleged effort to talk to the Master or because he was not asked to return;

OPINION

I

Appellant's first and primary basis for appeal is without merit. The Master confronted him at the pilot air hoist with the medical officer's opinion that the scabies did not require his departure for treatment (official log for 22 November 1978). No other member of the crew left the vessel and all were

satisfactorily treated with "kwel" lotion after the 17th of November, and his departure from the ship came five days after his initial complaint about scabies with no intervening official record of his seeking more "kwel" lotion or authorization for medical treatment ashore. (Medical logs for 1-25 November 1978). The Administrative Law Judge did not find that the Appellant's scabies was medical justification for his absence on 22 November. He should have clearly ruled on this matter rather than confuse the record as to the absence offense. Instead, as an "act of clemency", he dismissed the absence without leave specification citing the Appellant's mental state as the reason. The proper course would have been to sustain the AWOL specification and the later offense of failure to join, and take into account Appellant's obvious distress over his condition based on a past case of scabies in issuing an appropriate order. It is clear that Appellant possessed the intent to desert at the time he left the vessel. This is more fully discussed in response to Appellant's fourth basis for appeal.

II

The medical issue is even clearer as to the failure to join specification. Once Appellant went ashore in Labuan, he discovered there was no medical treatment available, and called the ship on 23 November to apologize to the Master (R-36). After failing to talk to the Master and getting no special encouragement to return, Appellant flew to Singapore that same day (R-36, 37). The Administrative Law Judge realized that, as of the VHF radio call by Appellant, his mind had cleared and he was aware that the vessel was in the closest source of medical treatment for his scabies, and that he contacted the vessel to apologize. It is abundantly clear that it was not reasonable for Appellant to substitute his medical opinion for that of the medical officer, who was giving him the appropriate medical treatment for scabies. Once he failed to find treatment ashore, he should have returned to his vessel for treatment, pending authorization for further treatment at a proper shore facility. As was stated in Decision on Appeal No. 1725, Appellant cannot argue his own desire to go to a hospital (or get treatment ashore) as a defense justifying his leaving the ship. The case is unlike that in Decision on Appeal No. 1745, where the Master stated he would not have considered the man a deserter if he had known he was enroute to the hospital. In this case, the Master expressly told Appellant not to leave, knowing of his scabies and knowing he was receiving proper medication on board. In Decisions on Appeal Nos. 1558 and 1832, it was held that an appellant must show "reasonable cause" for failure to join. It is clear in this case that failure to join was established, and that Appellant failed to demonstrate "reasonable cause."

III

Appellant's second basis for appeal is without merit. A petition to reopen a hearing should be granted under 46 CFR 5.25-10 only on the basis of new evidence. Appellant's bare assertions that the Second and Third Mate lied in their sworn depositions are not substantiated. Evaluation of the credibility of witnesses is a matter within the discretion of the Administrative Law Judge, and will not be set aside on appeal, barring a clear showing of abuse of that discretion. See Decision on Appeal No. 2052; affirmed Order EM-54, 2 NTSB 2810, reconsideration denied, NTSB Order EM-60. The Administrative Law Judge properly denied Appellant's petition to reopen the hearing. It should be noted that this denial was not a denial of his appeal as Appellant alleged.

IV

Appellant's third basis of appeal is that Coast Guard delay prejudiced his case because some of his witnesses were unable to recall the events of November, 1978. The Appellant did not raise this matter at the hearing. John Manning's deposition was the only one which indicates a memory problem, and Appellant's testimony and the other three depositions adequately cover the matters covered in John Manning's deposition. The delay in this case was not great and there is no indication of improper Coast Guard action to delay the proceedings. Since there is adequate evidence on Appellant's behalf to substitute for John Manning's testimony and since there is a clear showing of prejudice this basis for appeal is rejected.

V

Appellant's fourth basis for appeal is not well-founded. He misunderstood the opinion of the Administrative Law Judge because of the confusing treatment of the first specification. As noted above, both specifications should have been found proved, with possible mitigation of the severity of the order, based on Appellant's state of mind when he left the vessel on 22 November 1978. What the Administrative Law Judge did was give the Appellant the benefit of the doubt on the absence offense. That dismissal, however, did not affect the later offense of failure to join. It is clear from the record as a whole that there was substantial evidence of Appellant's intent to desert his vessel at the time he left on 22 November 1978. He had his shore going clothes, he had all of his personal effects in his bags, he was advised that there was no need for him to go ashore, and he was warned by the Master that his leaving would be desertion. The fact that the Administrative Law Judge dismissed the absence without leave (AWOL) specification, based on consideration of Appellant's anxiety over his medical situation, did not negate that intent to desert. the

specification was written for an AWOL on 22 November 1978. With dismissal of that specification the record cannot support a finding of AWOL on 22 November 1978. However, after 22 November 1978 and before the vessel sailed on 24 November 1978, and AWOL offense and, in fact, an intent to desert are abundantly obvious from the record as a whole. Appellant, on arriving ashore, could not get treatment in Labuan (R-36). His mental anxiety had subsided to the point that he called the vessel to make peace with the Master (R-36). He stayed in Labuan overnight and left for Singapore the following evening (23 November 1978) after calling the vessel to apologize (R-37). He made no other attempt to return to his vessel, but took another job upon reaching Singapore (R-45). Therefore, despite dismissal of the 22 November 1978 AWOL, the record amply supports a finding of AWOL, on 23 November 1978 which extended beyond the sailing of the vessel on 24 November 1978. Appellant could not have made the sailing because he had flown to Singapore the night before the vessel sailed. In Decision on Appeal No. 1725 it was held that failure to join exists when there is a combination of AWOL from a vessel, whether before or at the time of sailing of the vessel, and a failure to be on board when the vessel sails during the period of AWOL.

VI

Appellant's fifth basis for appeal is also rejected as without merit. There is no authority for the proposition that a seaman, once being absent without leave, must be asked to return or encouraged to return by the Master. Appellant clearly understood when he called on the VHF radio-telephone that he should have returned to his vessel. He willingly chose not to, and in fact flew from Labuan to Singapore the same evening he called the vessel. (R-36, 42-43).

VII

There is another matter that merits comment. As noted above, the Administrative Law Judge took the deposition of John Manning on 8 January 1980 on behalf of Appellant, but in his (Appellant's) absence. In the first place, the testimony of Manning should not have been taken by deposition because he was obviously available to testify before this Administrative Law Judge in Long Beach. Appellant should have been present or, at the least, have been given notice of the deposition proceedings. This was not done. However, because the witness was deposed on behalf of Appellant, Appellant read the deposition at the 11 April 1980 hearings, and moved its admission into evidence (R-25-26), any error was waived by Appellant. Had the error been connected with an Investigating Officer's witness the problem would, of course, have been worse.

CONCLUSION

The findings, based upon substantial evidence, support the allegation that Appellant wrongfully failed to join his vessel on 24 November 1978.

ORDER

The order of the Administrative Law Judge entered at Long Beach, California, on 30 April 1980, is AFFIRMED.

R.H. SCARBOROUGH
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 10th day of September 1981.